

# **Affirmative Measures in the Law of Republic of Serbia**

Belgrade, June 2012

## *Abstract*

Over the past decade, Serbia has built a consistent legislative framework dealing with prohibition of discrimination on different grounds. This legislative framework also foresees specific affirmative (positive) measures aimed at achieving equal opportunities for all citizens. This paper explores affirmative measures stipulated in several relevant legal documents in the field of anti-discrimination: Constitution of Republic of Serbia, Law on Prohibition of Discrimination, Law On Prevention of Discrimination Against Persons with Disabilities and Law on Professional Rehabilitation and Employment of Persons with Disabilities. It concludes that, apart from being included into relevant legal documents, these measures should be also monitored and improved by the civil society, members of underrepresented groups and the Commissioner for Protection of Equality, in order to improve their implementation and create a society of equal opportunities.

## *Key words:*

Affirmative measures, Anti-Discrimination, the Commissioner for Protection of Equality

## Contents

1. Introduction.....	4
2. Relevant provisions on affirmative measures in selected laws of the Republic of Serbia.....	4
2.1. <i>Constitution of Republic of Serbia</i> .....	5
2.2. <i>Law on Prohibition of Discrimination</i> .....	6
2.3. <i>Law on Prevention of Discrimination against Persons with Disabilities</i> .....	6
2.4. <i>Law on Professional Rehabilitation and Employment of Persons with Disabilities</i> .....	7
Conclusion .....	8

## 1. Introduction

Several terms have been used, both in Serbia and worldwide, referring to different measures (legal and practical) taken in order to “remove deeply rooted social practices that interfere with the process of substantial equality in a society”.<sup>1</sup> These terms evolved as the states were developing their anti-discrimination legal frameworks, and include: *positive discrimination*, *special measures*, *affirmative measures*, *affirmative action*, or *positive measures*. The concept was widely accepted in mid XX century, when it became obvious that formal (legal) promotion of equality was not enough to provide equal opportunities for members of all social groups.<sup>2</sup> In order to determine these measures as an opposite to discrimination<sup>3</sup>, the term “positive discrimination” was mostly used, denoting “measures taken to rectify factual inequality”<sup>4</sup>. However, more recent trends intend to avoid the term positive discrimination, aiming to emphasize that discrimination should not have positive aspect of any kind.

Discussions over terminology did not miss Serbian legal community, and the confusion is still present, even in legal documents that use different terms (*See Title 2*). The latest practice of the Serbian Commissioner for Protection of Equality, however, is clear that discrimination is a negative concept, and preferably uses the term *affirmative measures* to determine different legal and practical measures taken in order to provide factual equality for specific social groups that are in inferior position within the society. Therefore, this paper intends to explore affirmative measures stipulated in Serbian legislation, focusing on the selected legal documents in the field of anti-discrimination.

## 2. Relevant provisions on affirmative measures in selected laws of the Republic of Serbia

Over the past decade, Serbia has built a consistent legislative framework dealing with prohibition of discrimination on different grounds. Even though the first comprehensive anti-discrimination law - Law on Prohibition of Discrimination - was adopted in 2009, the anti-

---

<sup>1</sup> I. Krstic, *Affirmative Action in the United States and the European Union: Comparative Analysis*, Facta Universitatis, Series: Law and Politica, Vol. 1, No 7, 2003, page 826, available at <http://facta.junis.ni.ac.rs/lap/lap2003/lap2003-06.pdf>, last accessed on 10 June 2012.

<sup>2</sup> The term “affirmative action” has been firstly used in the US National Labor Relations Act of 1935, referring to prohibition for employers to discriminate persons based on their membership in labor units. For more details on evolution of affirmative action in the USA and EU *see Ibid.*

<sup>3</sup> Article 2 of the Serbian Anti-Discrimination Law defines discrimination as “Any unwarranted distinction or unequal treatment, that is to say, omission (exclusion, limitation or preferential treatment) in relation to individuals or groups, as well as members of their families or persons close to them, be it overt or covert, on the grounds of race, skin colour, ancestors, citizenship, national affiliation or ethnic origin, language, religious or political beliefs, gender, gender identity, sexual orientation, financial position, birth, genetic characteristics, health, disability, marital and family status, previous convictions, age, appearance, membership in political, trade union and other organisations and other real or presumed personal characteristics.”

<sup>4</sup> R. Etinski, I. Krstic, *EU Law on the Elimination of Discrimination*, Faculties of Law of the Universities of Belgrade, Novi Sad, Nis and Maribor, 2009, page 136.

discrimination provisions were introduced in some other laws few years earlier, aimed at empowering specific groups of persons that are (historically, culturally, socially...) in a less favorable position within a society. Namely, Republic of Serbia anti-discrimination legal framework includes:

- ▶ Constitution of the Republic of Serbia (Official Gazette of the Republic of Serbia No 98/2006): Articles 14, 15, 21, 76, 77;
- ▶ Law on the Prohibition of Discrimination in the Republic of Serbia (Official Gazette of the Republic of Serbia No 22/2009);
- ▶ Law On Prevention of Discrimination Against Persons with Disabilities (Official Gazette of the Republic of Serbia No 33/2006);
- ▶ Law on Professional Rehabilitation and Employment Of Persons With Disabilities (Official Gazette of the Republic of Serbia No 36/2009);
- ▶ Gender Equality Act (Official Gazette of the Republic of Serbia No 104/2009);
- ▶ Law on Protection of Rights and Freedoms of National Minorities (Official Gazette of FRY No. 11 of 27 February 2002, Official Gazette of SM No. 1/2003, and Official Gazette of the Republic of Serbia No 72/2009).

Further, some other laws also contain anti-discrimination provisions, such as Law on Youth (Official Gazette of the Republic of Serbia No 50/2011); Law on Preschool Education (Official Gazette of the Republic of Serbia No 18/2010); Law on Fundamentals of Education System (Official Gazette of the Republic of Serbia No 72/2009 and 52/2011); Law on Churches and Religious Communities (Official Gazette of the Republic of Serbia No 36/2006); Labor Code (Official Gazette of the Republic of Serbia No 24/05, 61/05 and 54/09); Law on Sports (Official Gazette of the Republic of Serbia No 24/2011).

Due to its limited length, this paper will examine only the affirmative measures stipulated in the Constitution of Republic of Serbia, Law on Prohibition of Discrimination, Law on Prevention of Discrimination against Persons with Disabilities and Law on Professional Rehabilitation and Employment of Persons with Disabilities.

### ***2.1. Constitution of Republic of Serbia***

The Constitution of Republic of Serbia, adopted on 29<sup>th</sup> October 2006, establishes the principle of non-discrimination as one of its fundamental principles, but also deals in a special manner with the prohibition of discrimination against national minorities. This is explained with the importance and complexity of position of national minorities within society, as well as the general demographic picture of the country.

Article 21 of the Constitution, titled “Prohibition of Discrimination”, stipulates that “All are equal before the Constitution and law”, and guarantees the right to equal legal protection, without discrimination for everyone. Further, Article 21, paragraph 3, explicitly states that special measures introduced by the state in order to achieve full equality of individuals or group of individuals who are in a substantially unequal position compared to other citizens

shall not be deemed discrimination. The principle of anti-discrimination and introduction of special measures towards different social groups are further developed in specialized laws.

Special protection of rights of minorities is provided under the Title 3 of Section 2 of the Constitution - Rights of Persons Belonging to National Minorities. General prohibition of discrimination against national minorities is established in Article 76, guaranteeing equality before the law and equal legal protection for persons belonging to national minorities. The same article also states that “[s]pecific regulations and provisional measures which the Republic of Serbia may introduce in economic, social, cultural and political life for the purpose of achieving full equality among members of a national minority and citizens who belong to the majority, shall not be considered discrimination if they are aimed at eliminating extremely unfavorable living conditions which particularly affect them.”<sup>5</sup>

Dealing with the equality in administering public affairs, Article 77 stipulates that the ethnic structure of population and appropriate representation of members of national minorities shall be taken into consideration when taking up employment in state bodies, public services, bodies of autonomous province and local self-government units.

### ***2.2. Law on Prohibition of Discrimination***

Law on Prohibition of Discrimination is the first “umbrella” anti-discrimination law in Serbia, prohibiting all forms of discrimination on any grounds and establishing a special public institution authorized for protection and promotion of equality in the country – Commissioner for Protection of Equality (the Commissioner)<sup>6</sup>. Apart from giving the definition of discrimination, without limiting its grounds (*See FN 3*), this law also states that:

“Special measures introduced in order to achieve full equality, protection and prosperity of persons, or group of persons, that are in un-equal position are not considered as discrimination.”<sup>7</sup>

This provision is being implemented through the practice of the Commissioner which can recommend the other public authorities and individuals to undertake measures for achieving equality.<sup>8</sup>

### ***2.3. Law on Prevention of Discrimination against Persons with Disabilities***

Law on Prevention of Discrimination of Persons with Disabilities regulates the overall regime of protection against discrimination on the grounds of disability, as well as the specific cases of discrimination against persons with disabilities. This Law provides for the list of measures to be taken by the state aimed at promoting equality and social inclusion of persons with disabilities. These measures are given under Part Four of the Law, titled

---

<sup>5</sup> Article 76, para 3 of the Constitution of the Republic of Serbia.

<sup>6</sup> For more details on work and practice of the Commissioner for Protection of Equality see <http://www.ravnopravnost.gov.rs/engleski.php>, last accessed on 10 June 2012.

<sup>7</sup> Law on Prohibition of Discrimination, Article 14.

<sup>8</sup> *Ibid.* Article 33, paras. 7 and 9.

“Special Measures for Stimulating Equality of Persons with Disabilities”. These measures include:

1. Measures undertaken by the local self-governments aimed at stimulating establishment of the support services for persons with disabilities<sup>9</sup>;
2. Measures undertaken by local self-governments aimed at providing for accessible surrounding – physical surrounding, buildings, public spaces and transportation - to persons with disabilities<sup>10</sup>;
3. Measures aimed at securing equality in procedures before the public authorities<sup>11</sup>;
4. Measures for securing the access to information for persons of disabilities, to be taken by state and local authorities responsible for areas of culture and media<sup>12</sup>;
5. Measures to be taken by state and local authorities responsible for education, in order to include the education of persons with disabilities into the general system of education<sup>13</sup>;
6. Measures aimed at securing an equal participation of persons with disabilities in cultural, sports and religious spheres of the community, to be taken by local self-governments units<sup>14</sup>;
7. Activities aimed at creating equal opportunities, to be taken by all the state and local authorities. These activities should also include persons with disabilities and their associations.<sup>15</sup>

#### ***2.4. Law on Professional Rehabilitation and Employment of Persons with Disabilities***

The Law on Professional Rehabilitation and Employment of Persons with Disabilities governs number of issues relevant for professional rehabilitation and employment of persons with disabilities, including promotion of employment to create conditions for equal inclusion of persons with disabilities in the labour market, assessment of their capacity for work, professional rehabilitation as well as obligations to employ persons with disabilities. The Law prescribes different measures to be taken by employers and organisations in charge of employment issues, which are responsible for promotion of employment of persons with disabilities.<sup>16</sup> Activities related to promotion of employment of persons with disabilities are listed in Article 11 of the Law, and are as follows:

1. affirming equal opportunities of persons with disabilities in the labour market;
2. organising and implementing measures and activities for professional rehabilitation;
3. achieving rights to active employment policy measures i.e. measures for encouragement of self-employment of persons with disabilities;

---

<sup>9</sup> Article 32 of the Law on Prevention of Discrimination Against Persons with Disabilities.

<sup>10</sup> *Ibid*, Article 33.

<sup>11</sup> *Ibid*, Article 34.

<sup>12</sup> *Ibid*, Article 35.

<sup>13</sup> *Ibid*, Article 36.

<sup>14</sup> *Ibid*, Article 37.

<sup>15</sup> *Ibid*, Article 38.

<sup>16</sup> Article 10 of the Law on professional Rehabilitation and Employment of Persons with Disabilities.

4. ensuring technical, professional and financial support for adjustment of activities, workplace or activities and workplace, including technical and technological aids for the purpose of enhancing possibilities for the persons with disabilities to find and retain employment;
5. monitoring the effects of labour and social inclusion of persons with disabilities;
6. cooperating with organisations and associations of persons with disabilities, employers and other bodies and organisations for the purpose of encouraging employment and inclusion of persons with disabilities;
7. other activities carried out with the purpose to enhance employment and include the persons with disabilities in the labour market.

The Law stipulates that the persons with disabilities can be employed under general and special conditions, latter considering adjustments of the work activities (work process and work tasks), workplace (i.e. adjustment of technological or technical equipment) or both work activities and workplace, including professional assistance (counselling, training, etc).<sup>17</sup>

The Law also provides obligation for each employer who employs at least 20 employees to engage specific number of persons with disabilities, as follows:

- An employer with 20 to 49 employees shall be obliged to enter into labour relations with one person with disability;
- An employer having 50 and more employees shall be obliged to enter into labour relations with at least two persons with disabilities, and per any subsequently started number of 50 employees, he/she has obligation to engage 1 (one) person.<sup>18</sup>

However, a newly established employer does not have this obligation for the first 24 months from the day of establishment.<sup>19</sup>

The employer who does not fulfil this obligation will have a duty to pay a penalty in the amount of the three average salary for each person with disabilities that he was obligated to engage.<sup>20</sup>

## Conclusion

Apart from having developed an anti-discrimination legal framework, Serbia should work more on its implementation, in order to create equal opportunities for all citizens. This also means that the affirmative measures stipulated in different laws should be practiced and monitored, both by the Commissioner for Protection of Equality, members of underrepresented groups and civil society. So far, the Commissioner has provided for the recommendations to several subjects (including Republic of Serbia Parliament and National

---

<sup>17</sup> *Ibid.*, Article 23.

<sup>18</sup> *Ibid.*, Article 24.

<sup>19</sup> *Ibid.*, Article 25.

<sup>20</sup> *Ibid.*, Article 29.

Bank of Serbia) aimed at implementing anti-discrimination measures in their policies. The Commissioner also recommended the adoption of National Anti-Discrimination Strategy and the relevant Action Plan.<sup>21</sup> These steps are encouraging, since only by effective monitoring of implementation of anti-discrimination policies and affirmative measures, they can be properly adjusted to needs of special social groups that are still in the inferior position within our society.

---

<sup>21</sup> For details on recommendations of the Commissioner for Protection of Equality, see <http://www.ravnopravnost.gov.rs/lat/preporukeOrganimaJavneVlasti.php?idKat=24>, last accessed on 10 June 2012.

## References:

I. Krstic, *Affirmative Action in the United States and the European Union: Comparative Analysis*, Facta Universitatis, Series: Law and Politica, Vol. 1, No 7, 2003

R. Etinski, I. Krstic, *EU Law on the Elimination of Discrimination*, Faculties of Law of the Universities of Belgrade, Novi Sad, Nis and Maribor, 2009,

*Web sites:*

<http://www.ravnopravnost.gov.rs/engleski.php>

<http://www.equineteurope.org/>

*Relevant laws:*

Constitution of the Republic of Serbia (Official Gazette of the Republic of Serbia No 98/2006),

Law on the Prohibition of Discrimination in the Republic of Serbia (Official Gazette of the Republic of Serbia No 22/2009),

Law On Prevention of Discrimination Against Persons with Disabilities (Official Gazette of the Republic of Serbia No 33/2006),

Law on Professional Rehabilitation and Employment Of Persons With Disabilities (Official Gazette of the Republic of Serbia No 36/2009),

Gender Equality Act (Official Gazette of the Republic of Serbia No 104/2009),

Law on Protection of Rights and Freedoms of National Minorities (Official Gazette of FRY No. 11 of 27 February 2002, Official Gazette of SM No. 1/2003, and Official Gazette of the Republic of Serbia No 72/2009),

Law on Youth (Official Gazette of the Republic of Serbia No 50/2011),

Law on Preschool Education (Official Gazette of the Republic of Serbia No 18/2010),

Law on Fundamentals of Education System (Official Gazette of the Republic of Serbia No 72/2009 and 52/2011),

Law on Churches and Religious Communities (Official Gazette of the Republic of Serbia No 36/2006),

Labor Code (Official Gazette of the Republic of Serbia No 24/05, 61/05 and 54/09),

Law on Sports (Official Gazette of the Republic of Serbia No 24/2011).